Copyright Board of Canada

Annual Report • 2011-12

Copyright Board
Canada

CANADA

Commission du droit d'auteur
Canada

The Honourable Christian Paradis, P.C., M.P.
Minister of Industry and Minister of State (Agriculture)
Ottawa, Ontario
K1A 0A6

Dear Mr. Minister:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the twenty-fourth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2012.

Yours sincerely,

Claude Majeau

Claude Majeau
Vice-Chairman and
Chief Executive Officer

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Board Members and Staff

as of March 31, 2012

Chairman:	The Honourable Justice William J. Vancise
Vice-Chairman and Chief Executive Officer:	Claude Majeau
Members:	Jacinthe Théberge J. Nelson Landry
Secretary General:	Gilles McDougall
General Counsel:	Mario Bouchard
Legal Counsel:	Valérie Demers
Director, Research and Analysis:	Raphael Solomon
Economic Analyst:	Elizabeth Robert
Assistant Clerks:	Nadia Campanella Maryse Choquette Roch Levac
Registry Officers:	Sid J. Bateman Tina Lusignan
Manager, Corporate Services:	Ivy Lai
Financial and Administrative Assistant:	Joanne Touchette
Technical Support Officer:	Michel Gauthier

Chairman's Message

This is the seventh annual report in which I have had the opportunity to describe the Board's activities during the past fiscal year.

In 2011-12, the Board held a single hearing, relating to the Crown immunity claims asserted by some of the users of Access Copyright's Provincial and Territorial Governments Tariff. This hearing took place on September 27, 2011.

The Board issued three final decisions during the fiscal year. The first one dealt with the right to reproduce and perform works by educational institutions; the second dealt with the right to play sound recordings to accompany dance; and the third dealt with musical works and sound recordings as broadcast by CBC's conventional radio.

In addition, the Board issued nine interlocutory decisions, either interim, on applications to vary, or on a preliminary issue. These decisions related to an arbitration between SODRAC and ARTV, an interim tariff for private copying, an interim tariff for some Internet uses (SOCAN Tariffs 22.D on audiovisual webcasts and 22.G on audiovisual user-generated content), an application to vary Re:Sound's dance tariff, the Crown Immunity application mentioned above, and three applications to vary as well as an interim tariff in respect of the Access Copyright Post-Secondary Institutions Tariff.

All of these decisions are described in greater detail in this report.

In the last fiscal year, seven licenses were also issued under the provisions of the *Copyright Act* which permit the use of published works for which the copyright owners cannot be located.

I was invited to represent the Board in a panel session entitled *Views from the Judiciary*, at the 19[th] Annual Conference on Intellectual Property Law & Policy at Fordham University.

In conclusion, I wish to thank my colleagues as well as the Board's staff for their support and assistance during this very busy year. The Board is fortunate to have qualified and dedicated employees who truly bring meaning to the concept of public service. Their expertise and work ethic make the work of the Board possible.

The Honourable Justice William J. Vancise

Mandate of the Board

The Copyright Board of Canada was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issue licenses when the copyright owner cannot be located and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter.

The *Copyright Act* (the "*Act*") requires that the Board certify tariffs in the following fields: the public performance or communication of musical works and of sound recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions, and private copying. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a license.

The responsibilities of the Copyright Board under the *Act* are to:

- certify tariffs for
  - the public performance or the communication to the public by telecommunication of musical works and sound recordings;
  - the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the *Act*; and,
  - the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes;
- set levies for the private copying of recorded musical works;
- set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions;
- rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located;
- examine agreements made between a collective society and a user which have been filed with the Board by either party, where the Commissioner of Competition considers that the agreement is contrary to the public interest;
- receive such agreements with collective societies that are filed with it by any party to those agreements within 15 days of their conclusion; and,
- set compensation for formerly unprotected acts in countries that later join the Berne Convention, the Universal Convention or the Agreement establishing the World Trade Organization.

Finally, the Minister of Industry can direct the Board to conduct studies with respect to the exercise of its powers.

Operating Environment

Historical Overview

Copyright collective societies were introduced to Canada in 1925 when PRS England set up a subsidiary called the Canadian Performing Rights Society (CPRS). In 1931, the *Copyright Act* was amended in several respects. The need to register copyright assignments was abolished. Instead, CPRS had to deposit a list of all works comprising its repertoire and file tariffs with the Minister. If the Minister thought the society was acting against the public interest, he could trigger an inquiry into the activities of CPRS. Following such an inquiry, Cabinet was authorized to set the fees the society would charge.

Inquiries were held in 1932 and 1935. The second inquiry recommended the establishment of a tribunal to review, on a continuing basis and before they were effective, public performance tariffs. In 1936, the *Act* was amended to set up the Copyright Appeal Board.

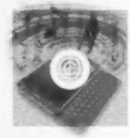
On February 1, 1989, the Copyright Board of Canada took over from the Copyright Appeal Board. The regime for public performance of music was continued, with a few minor modifications. The new Board also assumed jurisdiction in two new areas: the collective administration of rights other than the performing rights of musical works and the licensing of uses of published works whose owners cannot be located. Later the same year, the *Canada-US Free Trade Implementation Act* vested the Board with the power to set and apportion royalties for the newly created compulsory licensing scheme for works retransmitted on distant radio and television signals.

Bill C-32 (An Act to amend the *Copyright Act*) which received Royal Assent on April 25, 1997, modified the mandate of the Board by adding the responsibilities for the adoption of tariffs for the public performance and communication to the public by telecommunication of sound recordings of musical works, for the benefit of the performers of these works and of the makers of the sound recordings ("the neighbouring rights"), for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings ("the home-taping regime") and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes ("the educational rights").

General Powers of the Board

The Board has powers of a substantive and procedural nature. Some powers are granted to the Board expressly in the *Act* and some are implicitly recognized by the courts.

As a rule, the Board holds hearings. No hearing will be held if proceeding in writing accommodates a small user that would otherwise incur large costs. The hearing may be dispensed with on certain preliminary or interim issues. No hearings have been held to date for a request to use a work whose owner cannot be located. Information is obtained either in writing or through telephone calls.



The examination process is always the same. Tariffs come into effect on January 1. On or before the preceding 31st of March, the collective society must file a statement of proposed royalties which the Board then publishes in the *Canada Gazette*. Users (or, in the case of private copying, any interested person) or their representatives may object to the statement within 60 days. The collective society and the objectors present oral and written arguments. After deliberations, the Board certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons for its decision.

Guidelines and Principles Influencing the Board's Decisions

The decisions the Board makes are constrained in several respects. These constraints come from sources external to the Board: the law, regulations and judicial pronouncements. Others are self-imposed, in the form of guiding principles that can be found in the Board's decisions.

Court decisions also provide a large part of the framework within which the Board operates. Most decisions focus on issues of procedure, or apply the general principles of administrative decision-making to the specific circumstances of the Board. However, the courts have also set out several substantive principles for the Board to follow or that determine the ambit of the Board's mandate or discretion.

The Board also enjoys a fair amount of discretion, especially in areas of fact or policy. In making decisions, the Board itself has used various principles or concepts. Strictly speaking, these principles are not binding on the Board. They can be challenged by anyone at anytime. Indeed, the Board would illegally fetter its discretion if it considered itself bound by its previous decisions. However, these principles do offer guidance to both the Board and those who appear before it. In fact, they are essential to ensuring a desirable amount of consistency in decision-making.

Among those factors, the following seem to be the most prevalent: the coherence between the various elements of the public performance of music tariffs, the practicality aspects such as the ease of administration to avoid tariff structures that make it difficult to administer the tariff in a given market, the search for non-discriminatory practices, the relative use of protected works, the taking into account of Canadian circumstances, the stability in the setting of tariffs that minimizes disruption to users, as well as the comparisons with "proxy" markets and comparisons with similar prices in foreign markets.

Organization of the Board

Board members are appointed by the Governor in Council to hold office during good behaviour for a term not exceeding five years. They may be reappointed once.

The *Act* states that the Chairman must be a judge, either sitting or retired, of a superior, county or district court. The Chairman directs the work of the Board and apportions its caseload among the members.

The *Act* also designates the Vice-Chairman as Chief Executive Officer of the Board, exercising direction over the Board and supervision of its staff.

Chairman

The Honourable William J. Vancise, a justice of the Court of Appeal for Saskatchewan, was appointed part-time Chairman of the Board in May 2004 and reappointed in 2009 for a five-year term. Mr. Justice Vancise was appointed to the Court of Queen's Bench in 1982 and to the Court of Appeal for Saskatchewan in November 1983 where he continues to serve. In 1996, he was appointed Deputy Judge of the Supreme Court of the Northwest Territories. Mr. Justice Vancise earned an LL.B. from the University of Saskatchewan in 1960 and was called to the Saskatchewan Bar in 1961. He joined Balfour and Balfour as an associate in 1961 and in 1963 he was named a partner at Balfour, McLeod, McDonald, Laschuk and Kyle, where he became the managing partner in 1972. Mr. Justice Vancise received his Queen's Counsel designation in 1979.

Vice-Chairman & Chief Executive Officer

Claude Majeau was appointed as full-time Vice-Chairman and Chief Executive Officer in August 2009 for a five-year term. Since 1993, he occupied the position of Secretary General of the Copyright Board. Before joining the Board, Mr. Majeau worked for the Department of Communications of Canada from 1987 to 1993 as Director (Communications and Culture) for the Quebec Region. From 1984 to 1987, he was Chief of Staff to the Deputy Minister of the same department. Before 1987, he occupied various positions dealing with communications and cultural industries and public policy. Mr. Majeau earned an LL.B. from the Université du Québec à Montréal in 1977 and has been a member of the Barreau du Québec since 1979.

Members

Ms. Jacinthe Théberge is a full-time member appointed in May 2007 for a five-year term. Prior to her appointment, Ms. Théberge was practicing law with the Community Legal Centre of the Outaouais Region in the fields of civil and administrative matters. From 1991 to 2003, Ms. Théberge served as a part-time member of the Canadian Human Rights Tribunal. Recently, she worked in strategic planning as an advisor and analyst in the communications and health technologies sectors. Ms. Théberge is a graduate of the Université de Montréal (LL.B. in 1972).

J. Nelson Landry was appointed in February 2010 as a part-time member for five years. Most recently, Mr. Landry served as an arbitrator in intellectual property. From 2002 to 2005, he was an instructor of the Patent Agent Training Course – Infringement and Validity at the Intellectual Property Institute of Canada. In 2003, he taught part-time at the Université de Montréal and from 1969 to 2002, Mr. Landry was a senior partner at Ogilvy Renault. Mr. Landry obtained a BA in 1959 and a BSc in 1965 from the Université de Montréal. He also graduated with a B.C.L. from McGill University in 1968 and was called to the Québec Bar in 1969.

*Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2012-13 (Part III of the Estimates) and the Performance Report for 2011-12. These documents are or will soon be available on the Board's Web site (**www.cb-cda.gc.ca**).*

Background

The provisions under sections 67 onwards of the *Act* apply to the public performance of music or the communication of music to the public by telecommunication. Public performance of music means any musical work that is sung or performed in public, whether it be in a concert hall, a restaurant, a hockey stadium, a public plaza or other venue. Communication of music to the public by telecommunication means any transmission by radio, television or the Internet. Collective societies collect royalties from users based on the tariffs approved by the Board.

Filing of Tariff Proposals

On March 30, 2012, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and the Re:Sound Music Licensing Company (Re:Sound) filed their respective statement of proposed royalties to be collected in 2013; some tariffs cover more than one year. The proposed tariffs filed by Re:Sound include new tariffs for sports, comedy and magic shows, concerts and adult entertainment.

Hearings

During the fiscal year, the Board did not hold any hearings.

Decisions

Four decisions were rendered during the fiscal year, as follows:

July 8, 2011 – SOCAN-Re:Sound CBC Radio Tariff, 2006-2011

In December 2009, the Board held hearings to determine the SOCAN and Re:Sound royalties to be paid by the Canadian Broadcasting Corporation (CBC) for the years 2006 to 2011. The Board considered whether royalties paid by CBC should be linked to those paid by commercial radio stations. The Board ruled that they should not. Since none of the parties presented a coherent formula for determining the tariffs, the Board proposed its own formula and certified the resulting tariffs.

SOCAN sought royalties of $3,254,561 for 2006, $3,736,542 for 2007 and $4,027,525 for each year from 2008 to 2010 (2011 was added after the hearings). This was a significant increase over the $1,486,836 certified for 2005. SOCAN requested that the 1991 tariff formula be reinstated, thereby basing the CBC tariff on three elements: royalties commercial radio stations pay to SOCAN; CBC radio's use of the SOCAN repertoire as compared to commercial radio; and CBC radio's audience share as compared to commercial radio. The high rates proposed by SOCAN reflected proportional increases in music use and audience share.

Re:Sound requested that the Board continue to set its royalties as a proportion of SOCAN's; all parties agreed that this approach was acceptable.

In support of their submissions, the collectives presented evidence on the evolution of the use of music on CBC radio, including evidence on the use of their respective repertoire. Both collectives raised concerns about the reliability of CBC radio logs.

CBC submitted that its SOCAN royalties should be calculated as a percentage of its radio operating expenses. It opposed the use of the 1991 tariff formula by arguing that it is unfair to tie royalty obligations to the income of a third party, particularly one with a very different mandate and business model. CBC presented four witnesses who submitted that there are key differences between commercial broadcasters and CBC radio. CBC additionally submitted that simulcasting of its over-the-air signals should be included in the main tariff.

The Board rejected the use of the 1991 formula. It concluded that most of the assumptions that underpin that formula have become either questionable or simply wrong. The formula used earnings from commercial radio to determine how much CBC should pay; however, the disconnect between commercial radio and CBC radio was deemed too great to permit using the 1991 formula in 2011. The Board acknowledged the unique nature of CBC and recognized that any analogy to commercial radio should take this into account.

The Board rejected CBC's proposal to calculate the radio tariff as a percentage of its radio operating expenses. Not only would such an approach make it impossible to reflect audience share and music use in the tariff, it would base the tariff on CBC's expenses rather than on the value of music.

The Board concluded that the tariff formulas proposed by each of the parties were unacceptable. The Board used the 1991 SOCAN amount as a starting point, because, while it had rejected the 1991 formula, it found no evidence that the application of the formula in 1991 yielded an unfair result.

The Board adjusted the amount for music use, audience, and inflation. First, it used data provided by the collectives to calculate how much music CBC radio used in 1991 and in 2008. The Board compared the number of "music impressions" for the two years, defined as the product of broadcast hours (i.e. the number of minutes of music used by CBC) and tuning hours, to determine the appropriate royalty for 2008. Royalties for other years were calculated through interpolation or extrapolation.

Second, the Board deemed that CBC radio tariffs should grow with inflation. It decided that the CPI is the best measure of inflation to preserve purchasing power and applied the CPI from January 1991 to December 2008, without further adjustment. In previous years, it had applied the CPI less one per cent in order to ensure equitable treatment of both music users and copyright owners, and also to prevent the tariff from contributing to inflation rates within a given sector of the economy. These considerations were no longer sufficiently relevant to justify reducing the CPI by one per cent.

Next, the Board used the SOCAN tariff to determine the Re:Sound tariff. By analogy to its earlier 1993 decision in Retransmission, the Board created the concept of musical impressions, which count the number of hours listeners hear protected music on CBC radio. Music impressions account for all variations in amount of music listened to on CBC, regardless of their cause; they can also account for shifting music to "music stations". Most importantly, as a measure, music impressions sidestep the question of how to weight the four stations of CBC conventional radio in any calculations.

The Board concluded that the ratio of musical impressions of Re:Sound's repertoire relative to SOCAN's repertoire is 77.32 per cent. It adjusted the Re:Sound tariff accordingly.

Finally, the Board adjusted the royalties to account for simulcasting. It agreed with CBC that simulcasting should be included in the main tariff, but noted that the record on which to base the simulcasting tariff is very thin. It therefore chose not to set simulcasting royalties as a function of simulcasting income for the time being. Instead, the Board calculated that, on average, simulcasting listeners made up the equivalent of 1.22 per cent of conventional listeners. Both SOCAN and Re:Sound royalties were increased accordingly.

Monthly CBC tariffs, after all adjustments were made, were set at $136,506.30 for SOCAN and $105,544.53 for Re:Sound in 2008. Retroactive rates were subject to interest. The Board held that the practice of using interest factors on retroactive tariffs should be generalized. The following table sets out the schedule of payments for CBC.

SOCAN and Re:Sound Royalties

Year	SOCAN Royalties	Re:Sound Royalties	Total Royalties
2006	$1,587,776.75	$1,223,510.57	$2,811,287.32
2007	$1,605,401.08	$1,237,091.54	$2,842,492.61
2008	$1,643,609.62	$1,266,534.31	$2,910,143.93
2009	$1,669,743.01	$1,286,672.21	$2,956,415.22
2010	$1,704,640.64	$1,313,563.66	$3,018,204.30
2011	$1,738,733.46	$1,339,834.93	$3,078,568.39

July 15, 2011 – Re:Sound Tariff 6.A (Use of Recorded Music to Accompany Dance, 2008-2012)

On March 30, 2007, Re:Sound filed its inaugural tariff proposal for the performance in public or the communication to the public by telecommunication of published sound recordings to accompany dance and fitness for the years 2008 to 2012. Proposals for fitness and dance were filed and heard together but the two tariffs were split at the decision stage.

Although no timely objections were filed, seven parties sought leave to intervene in the proceedings roughly ten months after the Board's deadline for objections. The Board granted leave with full participatory rights. Only two parties gave evidence in opposition to the proposed dance tariff: the Alliance of Beverage Licensees of British Colombia (ABLE BC), a trade association, and the Canadian Restaurant and Foodservices Association (CRFA), Canada's largest hospitality association.

Re:Sound proposed a monthly fee of $3.62 multiplied by the capacity of the dance venue. To determine this fee, it used the rate it had proposed for fitness centres and then adjusted it for repertoire use and to account for different measurement units (per person of capacity instead of per member).

Re:Sound presented evidence from two experts, Drs. Bernardino and McHale, who argued that a fair tariff for dance venues was 8 per cent of revenues, adjusted to 4 per cent to account for repertoire. Their argument was based on three steps. First, Dr. Bernardino calculated the value of recorded music to fitness club members using a survey and an estimated discrete choice model. Second, Dr. McHale used this value to calculate the value of recorded music to fitness venues. Finally, Re:Sound argued that the value of music to dance venues could be no less than to fitness venues (before adjusting for repertoire). Re:Sound then provided evidence to determine the average revenue of dance venues, which it used to convert its rate from a revenue basis to an attendance basis.

ABLE BC argued that the evidence presented by Re:Sound did not correctly represent dancing venues because it emphasized nightclubs rather than accounting for all pubs and other establishments that would be subject to the tariff. Dance venue owners testified that the tariff would make them reconsider playing recorded music for dancing. Both ABLE BC and CRFA argued that SOCAN Tariff 18 (Recorded music for dancing) should serve as a benchmark for the Re:Sound tariff. ABLE BC proposed that the Re:Sound tariff be set at no more than 50 per cent of SOCAN Tariff 18.

The Board rejected Re:Sound's claim that the tariff rate for fitness centres was an appropriate benchmark for dance venues since these two businesses have different business models and make different uses of music. The Board additionally specified that the value of music to dance venues is greater than it is to fitness clubs because music is ubiquitous and necessary in dance venues while it is partial and optional in fitness centres. It accepted the Objectors' proposal to use SOCAN Tariff 18 as a benchmark, applying a 50 per cent repertoire adjustment. It noted that although this adjustment was not based on a repertoire study, it was acceptable because both Re:Sound and the Objectors agreed to it.

To calculate the rate, the Board therefore adjusted SOCAN Tariff 18 for repertoire and inflation. The certified annual rates are:

	Days of operation	
Months of operation	**1-3 days**	**4-7 days**
Six months or less	$151.19	$302.38
More than six months	$302.38	$604.76

These rates are increased by 10 per cent for each 20 patrons in capacity exceeding 100 patrons.

January 30, 2011 – Re:Sound Tariff 6.A (Use of Recorded Music to Accompany Dance, 2008-2012) – Application to Vary

On December 12, 2011, Montage Management Inc. requested that the Board vary Tariff 6.A so that it could pay amounts owed for the tariff over a one-year period ending some time in 2012. Re:Sound opposed such a modification. The Board dismissed Montage's application, mostly because the application raised enforcement issues that are generally addressed by the courts.

Montage applied for judicial review of the Board's decision. The matter was still pending at the end of the reporting period for this report.

February 17, 2012 – SOCAN Tariffs 22.4 (2007-2008) and 22.D (2009-2011) [Tariff 22.D] – Audiovisual Webcasts; SOCAN Tariffs 22.7 (2007-2008) and 22.G (2009-2011) [Tariff 22.G] – Audiovisual User-Generated Content (Application for Interim Tariff)

SOCAN has filed proposed tariffs for the use of its repertoire in audiovisual webcasts (Tariff 22.D) and audiovisual user-generated content transmitted over the Internet (Tariff 22.G). The Board has consolidated the examination of these proposed tariffs.

On June 13, 2011, SOCAN applied for an interim tariff. With respect to Tariff 22.D, SOCAN proposed the same rate paid by broadcasters subject to Tariff 2.A (Commercial Television Stations) and Tariff 17 (Transmission of Pay, Specialty and Other Television Services by Distribution Undertakings), that is 1.9 per cent of subscription or advertising revenues of the site or service. For Tariff 22.G, SOCAN proposed 6.8 per cent of advertising revenues for music videos and 1.9 per cent for all other audiovisual content.

In support of its application, SOCAN argued that users targeted by the proposed tariffs generate vast amounts of revenues, some of which are heavily dependent on the use of protected music. The absence of an applicable tariff, and the fact that the Board is not likely to issue a decision on the matter until 2013, would cause an unfair prejudice to both SOCAN members, who do not receive any royalties for the use of their works, and users, who do not know the extent of the liability they are accruing. An interim decision would allow filling this legal vacuum.

The objectors argued that SOCAN had failed to meet the test for granting interim relief. Prospective users are for the most part known to SOCAN and can be assumed to have the resources to pay the final tariff once set. The Objectors also noted that the Supreme Court of Canada was currently considering the issue of whether a download is a communication to the public by telecommunication, resulting in significant legal uncertainty regarding the Board's authority to certify the tariff.

The Board denied SOCAN's application for an interim tariff.

Generally, the best way to achieve the purposes of an interim decision is to maintain the *status quo* while preventing a legal vacuum. In order to determine the nature of the *status quo* in this instance, one had to look at the last tariff certified by the Board, which does not provide for the payment of royalties for audiovisual webcasts or for user-generated content. As a result, the fundamental issue to be addressed was whether the Board should grant an interim tariff where no final tariff presently existed.

The Board concluded several reasons existed to refuse the application. First, SOCAN asked for an interim tariff targeting uses, whereas the existing certified tariffs are user-based. There was no evidence adduced to justify modifying the existing tariff structure. SOCAN could provide evidence to the Board to do so during the hearing on the final tariff.

Second, the proposed interim tariff specifically targeted sites that provide user-generated content. In contrast, the proposed final tariff seeks to collect royalties *for* communications of musical works originating from such sites, without identifying the payers. To adopt in an interim tariff a structure that significantly departs from the proposed final tariff makes no sense, particularly in light of the fact that there is an ongoing debate as to who are the proper payers of the tariff. In this respect, some objectors will doubtless argue that they are not themselves engaged in communicating works to the public by telecommunication since they only provide the means of telecommunication necessary for another person to communicate.

Third, SOCAN did not provide any substantial economic rationale for the rates it proposed. When one is seeking to modify the *status quo*, it would be difficult, if not impossible, to establish a rate, even an interim one, in the absence of any evidence regarding the value of these uses.

A number of other issues militated against an interim decision. Is SOCAN entitled to a tariff? If so, who should pay it? What is the appropriate rate base? These issues are complex and go to the fundamental structure of any tariff, interim or final. They cannot be addressed without some evidence and, as such, will be best addressed in the context of the main application.

Finally, the absence of an interim tariff did not cause deleterious effects that could not be remedied through the issuance of the final tariff. In the event that SOCAN makes its case and that a tariff is certified in accordance with the terms it proposed, SOCAN will receive the quantum of royalties to which its members are entitled on a retroactive basis.

General Regime

Background

Sections 70.12 to 70.191 of the *Act* give collective societies that are not subject to a specific regime the option of filing a proposed tariff with the Board. The review and certification process for such tariffs is the same as under the specific regimes. The certified tariff is enforceable against all users; however, in contrast to the specific regimes, agreements signed pursuant to the general regime take precedence over the tariff.

Filing of Tariff Proposals

The following tariff proposals were filed with the Board in March 2012 in accordance with section 70.13 of the *Act*:

- Tariff filed by Access Copyright for the reproduction, in Canada, in 2013 to 2015, of works in its repertoire for the purposes of elementary or secondary education;
- Tariff filed by ACTRA PRS/MROC for the reproduction, in Canada, of performers' performances by commercial radio stations for the year 2013;
- Tariffs filed by CMRRA-SODRAC Inc. (CSI) for the reproduction of musical works, in Canada, by non-commercial radio stations, commercial radio stations, online music services and satellite radio services, all for the year 2013;
- Tariffs filed by the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) for the reproduction of musical works embedded in a music video, in Canada, by online music services and for the reproduction of musical works embedded in cinematographic works, for the year 2013.

Hearings

During fiscal year 2011-12, the Board held a hearing (on September 27, 2011) to examine the question of whether the concept of Crown immunity relieves provincial and territorial governments from the requirement of paying royalties for reprographic reproductions of protected works.

Decisions

Five decisions were rendered during the fiscal year, as follows:

April 7, 2011 – Access Copyright Tariff for Post-Secondary Educational Institutions, 2011-2013 (Amendment to Interim Tariff)

On December 23, 2010, the Board certified the *Access Copyright Interim Post-Secondary Educational Institutions Tariff, 2011-2013.*

In the decision that accompanied the tariff, the Board invited participants to suggest changes to the interim tariff that may prove useful or necessary. The above-referenced decision dealt with the changes requested further to that invitation. The main changes that were made as a result were as follows:

- Section 70.191 of the *Act* provides that in the general regime, agreements trump tariffs. Nevertheless, at the request of the parties, the Board added to the interim tariff a provision stating what is otherwise obvious;
- Precision was added to the definition of full-time equivalent (FTE);
- The fact that the interim tariff does not allow copying sheet music was clarified;
- The Board refused to modify the provisions dealing with alternate format copies and microfiches, having found them sufficiently clear. However, it agreed to remove reporting requirements for these copies;
- At the request of the objectors, a provision requiring an institution to keep Access informed of communications that mention Access was removed;
- The wording of the posters that an institution is to affix near copying devices was modified;
- The amount of a work that users can copy in coursepacks was increased from 15 to 20 per cent;
- The terms and conditions relating to making digital copies pursuant to Schedule G were somewhat modified. Thus, all payments and reporting requirements for digital copies were removed.

June 28 and September 8, 2011 – Access Copyright Tariff for Post-Secondary Educational Institutions, 2011-2013 (Application to Vary the Interim Tariff: Academic Year)

Paragraph 14(a) of the interim tariff the Board adopted on December 23, 2010 provides that:

> 14. An Institution shall pay to Access Copyright:
>
> (a) For all copies made pursuant to section 2(a) of this Tariff, an annual royalty calculated by multiplying the FTE by \$3.58 for Institutions that signed the Proprietary College Licence, and by \$3.38 for all other Institutions;

The concept of full-time equivalent (FTE) is inherently linked to the academic year, from September 1 of one year to August 31 of the following year. The *Act*, on the other hand, provides that proposed tariffs must be filed for one or more calendar years.

The Association of Universities and Colleges of Canada (AUCC) argued that while proposed tariffs must be filed for one or more calendar years, final tariffs need not be aligned to the calendar year; in this instance, liability under the interim tariff is based on the academic year. Access, for its part, argued that since the tariff must be certified for one or more calendar years, the determination of whether an institution is "in" or "out" should also be made for the calendar year.

The interim tariff did not deal with the issue. The fact that it sets an "annual royalty" implicitly meant that liability is engaged for a year, but it did not specify whether the academic year or calendar year should be used. Under the licences that governed the parties' business relations until the interim tariff came into effect, no ambiguity existed because the duration of the licence was linked to the academic year. The tariff, on the other hand, is based on the calendar year.

On January 21, 2011, both AUCC and the Association of Canadian Community Colleges (ACCC) asked the Board to deal with the issue. In its April 7 decision modifying the interim tariff, the Board, having noted the ambiguity, concluded that for the time being, the only way to reflect the reality of the environment in which institutions are operating was for Access to invoice them according to the academic schedule.

On May 17, 2011, Access requested that the Board clarify that both the interim tariff and the royalties payable pursuant to it are linked to the calendar year.

On June 28, 2011, the Board wrote that what was relevant in this case was not whether tariff liability must be for one or more years but whether the liability under the tariff must be linked to the calendar year. In the Board's view, this is not necessarily so. For example, tariff liability for the use of music is sometimes linked to an individual event (a concert) or time period (a month, in the case of commercial radio). Even if a certified tariff must be valid for one or more calendar years, the payment formula and dates for opting in or out can be anything the Board decides.

In this instance, the Board concluded that the solution to the ambiguity should be informed by the principle that the interim tariff should reflect as much as possible the most recent agreements between the parties. These agreements applied for a full academic year. Therefore, for the purposes of the interim tariff, both liability and the amount of royalties were to be determined on the basis of the academic year.

The Board amended the interim tariff to reflect this principle. However, rather than dictating the wording of the required amendments, it asked its General Counsel to attempt to reach an agreement with the parties on a wording that would achieve such a result. An agreement was reached and this agreement was incorporated in its decision of September 8, 2011.

September 23, 2011 – Access Copyright Tariff for Post-Secondary Educational Institutions, 2011-2013 (Application to Vary the Interim Tariff: Transactional Licence)

On June 8, 2011, AUCC asked the Board to amend the December 23, 2010 interim tariff. An educational institution wishing to avail itself of this tariff must pay a set sum of money per academic year per FTE. AUCC wanted to force Access to licence the single use of a single work ("transactional licence") by institutions that did not pay the FTE royalty.

In support of its application, AUCC relied on the following arguments. The purpose of the interim tariff is to maintain the *status quo*. Access was breaching the *status quo* by systematically denying applications for transactional licences, in an effort to force institutions to opt for the tariff. Access had encouraged its publisher affiliates to cease granting transactional licences; many had heeded that encouragement. The refusal to negotiate transactional licences showed bad faith that amounted to misconduct. Access was abusing its monopoly power.

Another objector, Professor Ariel Katz, supported AUCC's assessment but proposed instead that the Board force Access' publisher affiliates to offer transactional licences on reasonable terms. ACCC essentially supported AUCC but left it up to the Board to select the appropriate remedy.

Access responded that past offerings of transactional licences were more limited than the objectors suggested. Access granted such licences only to institutions that paid the FTE royalty. Paper transactional licences were granted only for uses that were not allowed by the general licence. A digital transactional licence was offered only because AUCC and ACCC refused to deal with digital copies in their model licences. Access stated it had acted in good faith. While it did inform its affiliates of the potential consequences of issuing transactional licences, it had not tried to dictate their conduct. It had even informed them that they retained the option to licence institutions directly. Finally, transactional licences were ill-suited to digital uses in a post-secondary setting, where the use of protected works is widespread, dispersed and decentralized.

The Board denied the applications to vary the interim tariff, for the following reasons:

First, AUCC and ACCC had asked previously that any interim tariff reflect pre-existing licences while allowing institutions to deal directly with copyright owners. The interim tariff does precisely this. Also, the refusal to deal with institutions on a transactional basis did not constitute misconduct by reason that Access was *prima facie* justified to rely on the interim tariff and let the regulatory process run its course.

Second, AUCC asked for something institutions either never had or rarely used. Based on the record, and at least since 2004, Access had granted digital or paper transactional licences only to institutions that paid the FTE royalty, and only for uses that were not allowed by the general licence. The use of digital transactional licences has been minimal.

Third, once a tariff is in place, a collective should be entitled to rely on it. Therefore, a collective's refusal to deal with users outside of the tariff does not constitute misconduct warranting an intervention on the part of the Board.

Fourth, the evidence tended to demonstrate that Access and its affiliates had not colluded with one another. The refusal to issue direct digital transactional licences seemed part of a trend, independent from the current proceedings, whereby publishers let third party clearinghouses handle their digital licensing, due to lack of staff to handle case by case permissions. Access had informed its affiliates of one possible consequence of issuing licences while these proceedings were under way: copies of works in the repertoire of Access that are licensed directly with an affiliate would be removed from any royalty calculation. Informing affiliates of such facts is common sense and did not amount to conspiracy.

Fifth, claims that Access exercised monopoly power remained unproven. Access is at most a natural monopoly which exercises market power based on its ability to offer copyright owners and users economies of scale. AUCC even contended that Access competes with its affiliates and other publishers and authors.

Sixth, transactional licences inherently raise monitoring issues, especially in such a decentralized setting as that of the institutions. Yet, rather than suggesting mechanisms that might provide some comfort on compliance control, objectors proposed the transactional licence be exempt from all the provisions of the interim tariff. Reporting, monitoring and audit are key to most licensing regimes. The absence of such provisions would be an invitation to copyright violation and is unthinkable.

Seventh, the administration of transactional licences tends to be cost intensive.

Eighth, the documents objectors had filed contained so many explicit or implicit contradictions that it had become difficult to lend credence to their statements. For example, the ability to make digital copies of works in Access' repertoire cannot both be of such marginal value as not to require an interim tariff and be of such crucial importance as to require generous access to transactional licences.

Ninth, allowing transactional licences pursuant to the interim tariff could lure institutions into a false sense of security. A licence issued pursuant to the interim tariff could not provide closure. Were the final tariff to provide only for a FTE royalty then the institution that availed itself of an interim transactional licence would be liable for the full FTE price unless the final tariff provides otherwise.

Finally, the balance of convenience favoured Access.

The Board indicated that it did not have the power to issue the remedy proposed by Professor Katz. One must not confuse the power to regulate a collective's dealings with users, which the Board has, with the power to regulate the dealings of a collective's rights holders with those same users, which it does not have.

January 5 (Decision) and March 15, 2012 (Reasons) – Access Copyright Tariff for Provincial and Territorial Governments, 2005-2014 (Crown Immunity Application)

Access filed proposed tariffs for the reproduction of works in its repertoire by employees of provincial and territorial governments, except Québec.

The governments of Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Nunavut, Prince Edward Island and Saskatchewan challenged the legality of the proposed tariffs on the basis of Crown immunity. Access argued that (1) the doctrine was not engaged, (2) that even if engaged, the *Copyright Act* applied to the Crown by necessary implication, or (3) that the objectors had waived any immunity they may otherwise enjoy.

The parties jointly requested that the Board decide the matter by way of a preliminary hearing based on an agreed statement of facts. The Board acceded to the request. The matter was heard on September 27, 2011.

On January 5, 2012, the Board issued its decision, with reasons to follow. It dismissed the Objectors' claim by reason that the *Act* binds the Crown by necessary implication. On March 15, 2012, the Board issued the reasons of its decision.

I. Preliminary questions

Is the principle of Crown immunity engaged?

Before dealing with the substantive issue of whether the Objectors were immune from the provisions of the *Act*, it was necessary to decide whether the principle of Crown immunity was even engaged. Access contended that it was not.

Access argued that the *Act* does not operate to the prejudice of the Crown. It contended that the *Act* promotes the Crown's interest. Thus, there was no prejudice to the Crown and immunity was not engaged in this case.

The Board rejected this argument. The specific provisions of the *Act* from which the objectors claimed immunity relate to the certification by the Board of a tariff for the reproduction of literary works by provincial and territorial governments. Under the proposed tariff, the Crown would be required to pay royalties and to comply with the terms of the tariff for the reproductions they make of published works. The proposed tariffs are an example of clear and specific prejudice to the Crown that does engage Crown immunity.

Access also contented that copyright is property and that under the common law, a government may not expropriate property without just compensation absent a clear and unambiguous legislative intention to do so.

The Board also rejected this argument. Copyright is a *sui generis* statutory right which is not, properly speaking, a form of property. Moreover, expropriation requires that the Crown's action has the effect of rendering the assets virtually useless. In this case, the objectors' actions did not deprive the rights holders of their rights under the *Act* rendering those rights virtually useless. Rather, the objectors sought to reproduce or use literary works without having to compensate the rights holders of those works. While there is certainly a potential lack of compensation, the rights conferred under the *Act* remain exercisable between private parties. As a result, the "no expropriation" principle was of no assistance to Access. Thus, the principle of Crown immunity was engaged.

Finally, Access submitted that the principle of Crown immunity was better expressed as a rule of construction, rather than a presumption to be rebutted. As such, it was incorrect to speak of one party bearing the "onus" to shift the presumption. No one bears an onus to establish that a particular statute is applicable to the Crown.

The Board disagreed. Section 17 of the *Interpretation Act*[a] provides that "no enactment is binding on Her Majesty [...] except as mentioned or referred to in the enactment." This creates an overall presumption of immunity. That presumption can be rebutted where it can be demonstrated that there exists a contrary intention to bind the Crown. Access therefore had to overcome this presumption and demonstrate that the *Act* did bind the Crown.

II. Crown Immunity – General Principle

This legal debate centred on the interpretation of section 17 of the *Interpretation Act* which codifies the common law principle of Crown immunity.

Crown immunity is not absolute. It can be rebutted by:

> [...] (1) expressly binding words; (2) an intention revealed when provisions are read in the context of other textual provisions; and, (3) an intention to bind where an absurdity, as opposed to an undesirable result, were to occur if the government were not bound. Any exception to the normal Crown immunity rule based on a necessary implication should be narrowly confined.[b]

The Board agreed with the parties that there are no expressly binding words which establish that the Crown is bound by the *Act*. It therefore had to decide whether the *Act* bound the Crown by necessary implication when the provisions were read in the context of other textual provisions. Given the conclusion the Board reached, it was not necessary to decide whether there would be a resulting absurdity were the Crown not so bound.

[a] R.S.C., 1985, c. I-21.

[b] *AGT v. CRTC* [1989] 2 S.C.R. 225 at 281.

Is the Crown bound by necessary implication?

Access argued that when examining the *Act* in its entirety there was, by necessary implication, a clear intention to bind the Crown. It pointed to a number of provisions that exempted the Crown from clearing the rights to use certain protected copyright subject-matters. It argued that these exceptions raised a logical implication that the Crown was bound by those provisions from which it has not been exempted.

The objectors, for their part, relied on section 12 of the *Act* to argue that Crown immunity was maintained. In their submission, this section demonstrated Parliament's intent to maintain Crown immunity notwithstanding that the Crown may enjoy certain benefits pursuant to the *Act*.

The Board proceeded to the contextual analysis of the *Act* in a two-part analysis. First, is section 12 of relevance when deciding whether *Act* binds the Crown? Second, do the specific exceptions that apply to the Crown demonstrate that the Crown is otherwise bound by the *Act*?

Is section 12 relevant when examining whether the *Act* binds the Crown?

Section 12 of the *Act* states:

> Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

The parties debated at length the meaning of the words "without prejudice to any rights or privileges of the Crown". If, as the Objectors argued, these rights and privileges are all the rights and privileges accorded to the Crown, including immunity, then the inference was that by adopting section 12, Parliament specifically allowed the Crown to maintain its overall immunity from the *Act* despite the Crown being granted certain rights pursuant to other provisions of the *Act*. On the other hand, if these words meant only those copyrights granted to the Crown under common law, then section 12 was limited to the grant of copyright and could not be read to infer any Parliamentary intent regarding immunity.

Reading section 12 in the context of the *Act*, the Board concluded that the quoted expression must be read to mean those rights and prerogatives as they relate to Crown copyright, exclusively; it cannot be read to infer any intent on behalf of Parliament to maintain Crown immunity.

Do the specific exceptions that apply to the Crown demonstrate that the Crown is otherwise bound by the *Act*?

Relying on the maxim *expressio unius est exclusio alterius*, Access argued that since the *Act* contained provisions exempting the Crown from some of its provisions, the exempting sections raised a logical implication that the Crown is bound by those provisions from which it is not exempt.

The *Act* contains at least twenty exceptions that expressly benefit the provincial or federal Crown. A first set of exceptions appear to benefit the Crown writ large. As an example, subsection 32.1(1) exempts from copyright infringement copies made to comply with federal or provincial access to information or privacy legislation. A second group benefits educational institutions, the definition of which clearly includes some emanations of the Crown, such as departments and agencies. The final set of exceptions is found in section 30.5 and concerns Library and Archives Canada, which section 4 of the constituent statute creates as "a branch of the federal public administration" and as such, part of the Crown.

According to the Board, the number and detailed nature of these exceptions seem to indicate a purposeful, explicit intention on the part of Parliament to identify and circumscribe activities that do not infringe copyright. If the Crown benefited from an overall immunity from the *Act*, why would Parliament spend so much time and effort in crafting these exceptions? When analyzing the whole of the *Act* contextually, one is irresistibly drawn to the logical conclusion that the *Act* generally binds the Crown. The principle of Crown immunity does not apply by necessary implication.

Have the Objectors waived their immunity?

Though this was unnecessary, the Board nevertheless considered it useful to comment on whether the Objectors had waived their immunity. The Board noted that for years, the Objectors had applied comprehensive written policies to ensure that the Crown and its agents respected copyright; they had sought out, sought authorization from and compensated rights holders for the use of their works. By such actions, the Objectors had waived their immunity and had chosen to bring themselves within the purview of the entire *Act*.

On April 16, 2012, and after the end of the period relevant to this report, the governments of Manitoba, Saskatchewan, New Brunswick, Nova Scotia and Prince Edward Island applied for judicial review of the Board's decision.

Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, on application of the society or the user, the Board can set the royalties and the related terms and conditions of a license for the use of the repertoire of a collective society subject to section 70.1, when the society and a user are unable to agree on the terms of the license.

In 2011-12, the Board did not hear any applications for arbitration.

Decisions

The Board rendered one decision during the fiscal year, as follows:

January 5, 2012 – Interim Decision on SODRAC v. ARTV

On September 30, 2011, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) asked the Board to set interim and final royalties for reproduction of its repertoire by ARTV, a national francophone television channel, from September 30, 2011 to September 30, 2014.

SODRAC had licensed ARTV continuously since 2001. On July 11, 2011, ARTV terminated the agreement, causing it to expire on August 31, 2011. At first, the parties agreed to continue to apply the expired agreement while negotiating a new agreement. However, ARTV advised on September 29, 2011 that it would no longer comply as of September 30, 2011. SODRAC filed its application with the Board the next day.

ARTV objected to the application for an interim licence. It stated that it did not need a synchronization licence since it only had a few in-house productions that used little or no SODRAC repertoire. It also stated that it does not need a licence for incidental reproductions, since these are already cleared downstream by producers. In the alternative, ARTV argued that the interim licence should be limited to incidental reproductions, that it should exclude reproductions made in its in-house productions and that, as a result, interim royalties should be a fifth or less than what was provided in the recently expired agreement.

SODRAC maintained that the interim license is necessary and should reflect the *status quo*. It argued that changes requested by ARTV were already at issue in another arbitration (*SODRAC v. SRC/CBC* and *SODRAC v. Groupe Astral)*.

The Board granted SODRAC's application for an interim licence, effective from September 30, 2011 until the Board makes its final decision or modifies it by an order of the Board for the following reasons. First, an interim decision was necessary to fill the legal vacuum resulting from the absence of a licence and to overcome the uncertainty with respect to ARTV's submissions. Second, ARTV did not demonstrate any change in circumstances that would justify an alternative approach. Third, a final, retroactive licence would properly reflect rights granted to ARTV by SODRAC and adjust any payments as required.

Requests

The Board received five requests for arbitration in the year 2010-11, as follows:

- 30 September, 2011 – Request for arbitration between SODRAC and ARTV and for an interim license;
- December 2, 2011 – Request for arbitration between SODRAC and CBC in relation to CBC's service entitled Espace.mu;
- December 16, 2011 – Request for arbitration between SODRAC and CBC in relation to CBC's interactive jukebox for its 75th anniversary;
- March 26, 2012 – Request for arbitration between SODRAC and CBC in relation to CBC's service entitled Explora;
- March 26, 2012 – Request for arbitration between SODRAC and CBC in relation to all reproductions made between April 1, 2012 and March 31, 2016.

Educational Rights

Background

Sections 29.6, 29.7 and 29.9 of the *Act* came into force on January 1, 1999. Since then, educational institutions and persons acting under their authority can, without the copyright owner's authorization, copy programs when they are communicated to the public and perform the copy before an audience consisting primarily of students. In a nutshell, institutions can copy and perform news and news commentaries and keep and perform the copy for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board in a tariff. Institutions can also copy other programs and subject-matters, and keep the copy for assessment purposes for thirty days; if they keep the copy any longer, or if they perform the copy at any time, the institution must then pay the royalties and comply with the conditions set by the Board in a tariff.

Filing of Tariff Proposal

No tariffs were filed in 2011-12.

Hearings

No hearings were held in 2011-12.

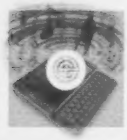
Decisions

The Board rendered one decision during the fiscal year, as follows:

December 24, 2011 – Educational Rights Collective of Canada Tariff, 2012-2016

On March 11, 2011, the Educational Rights Collective of Canada (ERCC) filed a proposed tariff for the reproduction and performance of works communicated to the public by telecommunication by educational institutions in Canada from 2012 to 2016. There were no objections to the statement, which was essentially identical to what the Board had certified for the years 2007 to 2011. The Board therefore certified for 2012 to 2016 the tariff as filed by ERCC.

The tariff provides two options: reproduction rights are cleared on a transactional basis unless the educational institution elects to comply with a comprehensive tariff.



Under the comprehensive tariff, educational institutions pay $1.73 per calendar year per pre-school, elementary and secondary (regular) full-time equivalent (FTE) student and $1.89 per calendar year per other FTE student. Copies can be kept and performed as long as the educational institution operates under the comprehensive tariff; if it switches to a transactional tariff, it will only be able to keep copies made under the comprehensive tariff for one or two years, subject to conditions defined in the tariff.

Under the transactional tariff, educational institutions pay $0.13 per minute for copies made from a radio signal and $1.60 per minute made from a television signal for copies intended for regular students. The rates for other students are $0.17 and $2.00, respectively. Copies made from the Internet are treated like copies from television signal unless there is no significant visual component. Copies made under a transactional tariff can be kept and performed for the life of the copy.

Retransmission of Distant Signals

Background

The *Act* provides for royalties to be paid by cable companies and other retransmitters for the retransmission of distant television and radio signals. The Board sets the royalties and allocates them among the collective societies representing copyright owners whose works are retransmitted.

Filing of Tariff Proposals

No tariffs were filed in 2011-12.

Hearings

No hearings were held in 2011-12.

Decisions

No decision was rendered during the fiscal year.

Private Copying

Background

The private copying regime entitles an individual to make copies (a "private copy") of sound recordings of musical works for that person's personal use. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid. Royalties are paid to the Canadian Private Copying Collective (CPCC) for the benefit of eligible authors, performers and producers.

The regime is universal. All importers and manufacturers pay the levy. However, since these media are not exclusively used to copy music, the levy is reduced to reflect non-music recording uses of media.

Filing of Tariff Proposals

On January 16, 2012, the Canadian Private Copying Collective (CPCC) filed a statement of proposed levies to be collected for private copying for the year 2014, in respect of CDs and microSD memory cards.

Hearings

No hearings were held during the fiscal year.

Decisions

One decision was rendered during the fiscal year, as follows:

December 19, 2011 – Interim Decision on Private Copying Tariff, 2012-2013

On November 18, 2011, the Canadian Private Copying Collective (CPCC) asked the Board to extend for the years 2012 and 2013, the *Private Copying Tariff, 2011* certified on December 18, 2010, on an interim basis. Objectors were notified of the application. No one opposed the application.

The Board granted the application. The interim tariff remains in force, unless modified, from January 1, 2012 until the Board certifies the final tariff for 2012 and 2013.

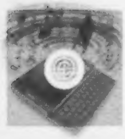
Unlocatable Copyright Owners

Pursuant to section 77 of the *Act*, the Board may grant licenses authorizing the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owner is unlocatable. However, the *Act* requires the applicants to make reasonable efforts to find the copyright owner. Licenses granted by the Board are non-exclusive and valid only in Canada.

During the fiscal year 2011-12, 28 applications were filed with the Board and the following seven licenses were issued:

- *National Film Board of Canada*, St-Laurent, Quebec, for the reproduction and incorporation of a photograph in a documentary film;
- *Carol Cloutier*, Cantley, Quebec, for the reproduction of 362 photographs and album covers in a book;
- *Wendy Mitchinson*, Bright, Ontario, for the reproduction and the communication to the public by telecommunication of three images published in The Canadian Home Journal in a article entitled "The Media, Gendered, Fat and Other Problematic Bodies";
- *Catherine Taddo*, Sault Ste. Marie, Ontario, for the mechanical reproduction and the communication to the public by telecommunication of a musical work entitled "Men are Like Street Cars" by Louis Jordan or Charley Jordan;
- *Nolin BBDO*, Montreal, Quebec, for the synchronization, reproduction and communication to the public by telecommunication of an excerpt of a musical work entitled "*Le temps est bon*" written by Stéphane Venne and published by JFM Investments Inc. in 1972;
- *PRODUCTIONS PHI-BRASSARD (JIMMY) INC.*, Montreal, Quebec, for the reproduction, synchronization and public performance of an excerpt of a musical recording entitled "Seeburg Background Music Record BA-109A" in a short film;
- *Centre collégial de développement de matériel didactique* (CCDMD), Montreal, Quebec, for the reproduction of a poster created by the artists group Kukryniksy.

Court Proceedings



Two applications for judicial review were filed with the Federal Court of Appeal in 2011-12, on which the Court has not yet rendered a decision:

- *Montage Management Inc. v. Re: Sound* [Tariff 6.A – Use of Recorded Music to Accompany Dance, 2008-2012 (Application to Vary)]
- *Manitoba v. Access Copyright* [Provincial and Territorial Governments Tariff, 2005-2014 – Crown Immunity Application]

Two other applications for judicial review were heard jointly by the Federal Court of Appeal in 2011-12:

Access Copyright Tariff for Post-Secondary Educational Institutions, 2011-2013

Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright) 2012 FCA 96

On September 19 and October 24, 2011, the Association of Universities and Colleges of Canada (AUCC) and the University of Manitoba filed applications for judicial review of two interlocutory decisions of the Board. The first application pertained to a ruling dated August 18, 2011, issued in the context of interrogatories, allowing Access Copyright to obtain information from educational institutions that had not availed themselves of the interim tariff. The second pertained to a September 23, 2011 decision dismissing an application to amend the *Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013* so as to require Access Copyright to issue transactional licences for the use of its repertoire.

On March 20, 2012, the Federal Court of Appeal dismissed the applications. The Court concluded that there were no special circumstances that justified its intervention at this stage of the proceedings before the Board. The Court also stated that this was manifestly a case where the Board should be permitted to complete its work before the Court could be called upon to consider administrative law remedies.

Five decisions of the Federal Court of Appeal appealed to the Supreme Court of Canada were heard in 2011-12:

- *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* [SOCAN Tariff 22.A (Internet – Online Music Services), 1996-2006];
- *Entertainment Software Association and Entertainment Software Association of Canada v. Society of Composers, Authors and Music Publishers of Canada and CMRRA/SODRAC Inc.* [SOCAN 22.B-G (Internet – Other Uses of Music), 1996-2006];
- *Bell Canada, Rogers Communications Inc., Puretracks Inc., and Telus Communications Company v. Society of Composers, Authors and Music Publishers of Canada* [SOCAN Tariff 22.A (Internet – Online Music Services), 1996-2006];
- *Alberta (Education) v. Access Copyright* [Access Copyright Tariff (Reprography – Educational Institutions), 2005-2009];
- *Re:Sound v. Motion Picture Theatre Associations of Canada* [Re:Sound Tariff 7 (Motion Picture Theatres and Drive-Ins) 2009-2011 and Tariff 9 (Commercial Television) 2009-2013].

The decisions of the Federal Court of Appeal were summarized in the 2010-11 Annual Report.

Agreements Filed with the Board

Pursuant to the *Act*, collective societies and users of copyrights can agree on the royalties and related terms of licenses for the use of a society's repertoire. Filing an agreement with the Board pursuant to section 70.5 of the *Act* within 15 days of its conclusion, shields the parties from prosecutions pursuant to section 45 of the *Competition Act*. The same provision grants the Commissioner of Competition appointed under the *Competition Act* access to those agreements. In turn, where the Commissioner considers that such an agreement is contrary to the public interest, he may request the Board to examine it. The Board then sets the royalties and the related terms and conditions of the license.

In 2011-12, 144 agreements were filed with the Board pursuant to section 70.5 of the *Act*.

Access Copyright which licenses reproduction rights such as digitization and photocopy, on behalf of writers, publishers and other creators, filed 46 agreements granting educational institutions, language schools, non-profit associations, copy shops and others a license to photocopy works in its repertoire.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 97 agreements. COPIBEC is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with Access Copyright) and foreign rights holders. The agreements filed in 2011-12 were concluded with various educational institutions, municipalities, non-profit associations and other users.

Finally, one agreement was filed jointly by Access Copyright and COPIBEC with respect to the Bank of Montreal.